

Department of Attorney General

Peter F. Kilmartin, Attorney General



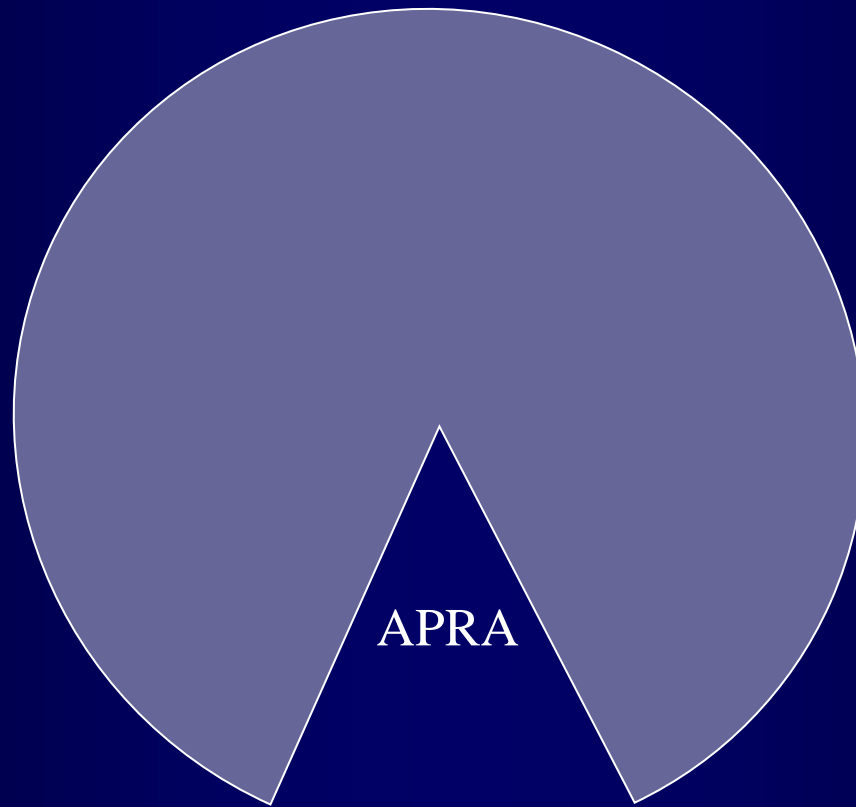
January 9, 2017

ANNUAL OPEN
GOVERNMENT
SUMMIT

JULY 28, 2017

Roger Williams University

Document Requests



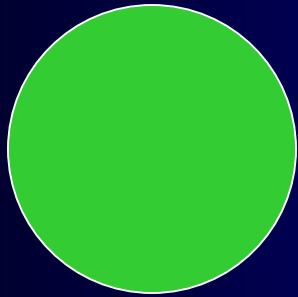
The Basics

Presume Public Document

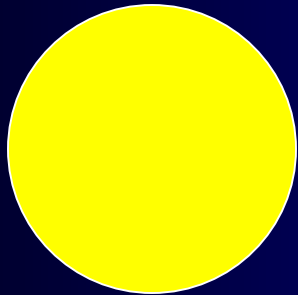
Is this an APRA request?

Who is making the
request?

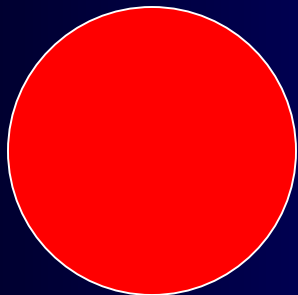
The Basics



- Must Disclose



- May Disclose



- Must Not Disclose

The Purpose

The right to access public records and the right to dignity and privacy are both recognized to be of the utmost importance.

R.I.G.L. § 38-2-1

“all records maintained or kept
on file by any public body ***
shall be public records and
every person or entity shall
have the right to inspect and/or
copy those records”

R.I.G.L. § 38-2-3(a)

No requirement to reorganize,
consolidate, or compile data not
maintained in the requested
form

Exception: records in an electronic
format and not unduly burdensome

R.I.G.L. § 38-2-3(h)

GoLocal Prov v. City of Providence, PR 16-20;
Katz v. Employees Retirement System, PR 16-32

Does APRA apply?

IS IT A PUBLIC BODY?

“or any other public or private agency,
person, partnership, corporation, or
business entity acting on behalf of and/or
in place of any public agency”

R.I.G.L. § 38-2-2(1)

IS IT AN APRA REQUEST?

Provide Documents
Not Narratives/Summaries

Salvatore v. So. Kingstown Town/School, PR 16-25

Procedures

“Each public body shall establish written procedures regarding access to public records”

- No written request if available per APA or prepared for/readily available to the public

R.I.G.L. § 38-2-3(d)

Desmarais v. Manville Fire Dept. Bd. of Wardens, PR 12-05;

Auclair v. Manville Fire District, PR 12-06;

Catanzaro v. East Greenwich Police Department, PR 13-08

Procedures Must Include

- Identification of designated public records officer or unit
- How to make a request
- Where to make a request

No requirement that request be made on public body's form, provided identifiable as request

R.I.G.L. § 38-2-3(d);

Farley v. Cranston School Dept., PR 13-26;

Rosenfield v. No. Kingstown School Dept., PR 14-02

Procedures

Copy of procedure shall be posted on public body's website if maintained & be otherwise readily available

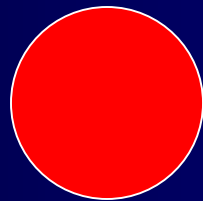
Buckley, et. al v. RI Turnpike & Bridge Auth., PR 13-23;
Fitzgerald v. East Providence Police Dept., PR 14-12;
Novak v. Western Coventry Fire Dist., PR 14-06

Department of Attorney General

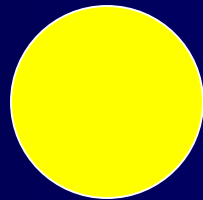
“unless you are seeking records available pursuant to the [APA] or other documents prepared for or readily available to the public, we ask that you complete the Public Records Request Form”

The Exemptions: R.I.G.L. § 38-2-2(4)

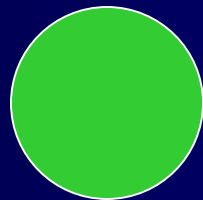
27 Exemptions



Confidential



Exempt



Public

Any reasonably segregable portion
of a public record shall be available

If entire document is exempt, must
state in writing that no reasonable
segregable information exists.

R.I.G.L. § 38-2-3(b)

Reilly v. Providence EDP, PR 13-01;

Waltonen v. West Greenwich Town Council, PR 12-19;

Murphy v. Town of North Smithfield, PR 12-11

Is It a Public Record?

- Does one of the twenty-seven exceptions apply?
- The Balancing Test: Does the individual's privacy interest outweigh the public's interest in disclosure?

“All records relating to a
client/attorney relationship * * *”

R.I.G.L. § 38-2-2(4)(A)(I)(a)
Chiaradio v. Town of Westerly, PR 16-17;
Harris v. City of Providence, PR 16-33;
Save the Bay v. DEM, PR 16-47

Individually – identifiable records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy pursuant to the FOIA.

R.I.G.L. § 38-2-2(4)(A)(I)(b)
Jackson v. Coventry School Dept, PR 16-03;
Brien v. Woonsocket Housing Auth., PR 16-29;
Cote v. City of Warwick, PR 16-39

Trade secrets and commercial or financial information obtained from a person, firm or corporation which is of a privileged or confidential nature.

R.I.G.L. § 38-2-2(4)(B)

Law Offices of Richard Humphrey v. DOH, PR 16-06

Public Employee Information*

- name
- gross salary
- salary range
- total cost of paid fringe benefits
- gross amount received in overtime
- other remuneration
- job title
- job description
- employment contract
- dates of employment
- positions held with the state, municipality, or public works projects
- work location or project
- business telephone number
- city/town of residence
- date of termination

Law Enforcement

Records maintained by law enforcement agencies for criminal law enforcement are exempt, but only if disclosure could:

R.I.G.L. § 38-2-2(4)(D)

- (a) reasonably be expected to interfere with investigations of criminal activity or enforcement proceedings
- (b) deprive a person of the right to a fair trial
- (c) reasonably be expected to constitute an unwarranted invasion of personal privacy

Providence Journal v. Dept. of Public Safety,
136 A.3d 1168 (R.I. 2016)

- (d) reasonably be expected to identify a confidential source
- (e) disclose techniques, procedures, or guidelines for law enforcement investigations or prosecutions
- (f) reasonably be expected to endanger the life or physical safety of any individual

Records relating to the management
and the direction of a law
enforcement agency and records or
reports reflecting the initial arrest
of an adult are public records

R.I.G.L. § 38-2-2(4)(D)

Niquette v. Woonsocket Police Dept., PR 16-19

Adult Arrest Logs

- Must be made available within 48 hours of a request (72 hours if made on a weekend or holiday).
- Applies only to arrests made within 5 days of the request.

R.I.G.L. § 38-2-3.2

Adult Arrest Logs

- Full name of arrested adult;
- Home address of arrested adult, unless doing so would identify a crime victim;
- Year of birth of arrested adult;
- Charge or charges;
- Date of the arrest;
- Time of the arrest;
- Gender of the arrested adult;
- Race of the arrested adult;
- Name of the arresting officer unless doing so would identify an undercover officer

R.I.G.L. § 38-2-3.2

“Any minutes of a meeting of a public body which are not required to be disclosed pursuant to [the OMA].”

R.I.G.L. § 38-2-2(4)(J)

Valley Breeze v. Pawtucket School Committee, OM 14-27

Preliminary drafts, notes,
impressions, memoranda, working
papers, and work products

Exception:

above documents submitted at a
public meeting shall be public

R.I.G.L. § 38-2-2(4)(K)

Correspondence of/to elected
officials with or relating to
those they represent and
correspondence of/to elected
officials in their official
capacity

R.I.G.L. § 38-2-2(4)(M)

All investigatory records of public bodies pertaining to possible violations of statute, rule, or regulation, other than records of final action taken

R.I.G.L. § 38-2-2(4)(P)

Warwick Post v. Warwick School Dept, PR 16-07;

Warwick Beacon v. Warwick School Committee, PR 16-07;

Howell v. City of Warwick, PR 16-07

**Records, reports, opinions,
information, and
statements required to be
kept confidential by federal
law, regulation, state law,
or rule of court**

R.I.G.L. § 38-2-2(4)(S)

Any individually identifiable
evaluations of public school
teachers made pursuant to
state or federal law or
regulation.

R.I.G.L. § 38-2-2(4)(Z)

All documents prepared by school districts intended to be used by school districts in protecting the safety of their students from potential and actual threats.

R.I.G.L. § 38-2-2(4)(AA)

Balancing Test

Does the privacy interest of the individual outweigh the public's interest in disclosure?

DARE v. Gannon, 713 A.2d 218, 225 (R.I. 1998)

Public Interest

“Official information that sheds light on an agency’s performance of its statutory duties.”

Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989)

Privacy Interest

“[W]here the subject of the documents ‘is a private citizen,’ ‘the privacy interest . . . is at its apex.’”

National Archives & Records Admin.v. Favish,
541 U.S. 157 (2003)

Fuka et al. v. R.I. DEM,
(Indeglia, J., April 2007)

home addresses of all
licensed commercial
fishermen and dealers

Shoemaker v. DOH, PR 13-15;

DeAscentis v. Town of Jamestown, PR 14-04

Responding to APRA Requests

Timeframe to Respond After Receiving a Request

- provide the records within ten (10) business days, **or**
- extend the time period for an additional twenty (20) business days for “good cause,” **or**
- deny access to records within ten (10) business days

R.I.G.L. § 38-2-7

Grieb v. Aquidneck Island Planning Comm, PR 16-31;
Smith v. The Compass School, PR 16-16

Procedures for Denying Access to Records

- denial must be in writing, and
- state the specific reason(s) for the denial, and
- indicate the procedure(s) for an appeal in R.I.G.L. § 38-2-8

R.I.G.L. § 38-2-7

CLF. v. Office of the Governor, PR 16-08;

Salvatore v. Town of So. Kingstown/School Dept, PR 16-25

Procedures *Prior* to Providing Records

- upon request, provide estimate of charges, **and**
- upon request, provide detailed itemization of search/retrieval costs, **and**
- perform search/retrieval within reasonable amount of time, **and**
- provide reduction or waiver of search/retrieval costs upon a court order

Procedures For “Good Cause”

- Explain in writing need for additional time
- Specific to request made (no boilerplate forms)
- Extend time based upon:
 - voluminous nature of request,
 - number of pending requests, or
 - difficulty in searching/retrieving/copying records

R.I.G.L. § 38-2-3(e)

Scalzi v. Town of North Smithfield, PR 16-09;

Plain v. Office of the Governor, PR 16-21;

Piskunov v. Town of Coventry, PR 16-36

Procedures For “Good Cause”

Unavailability of designated
public records officer shall
not be deemed “good cause”

R.I.G.L. § 38-2-3(d)

Costs

Cost and Delivery Procedures

- \$.15 per photocopy on common/legal size paper
- \$15.00 per search/retrieval hour, no charge for the first hour
- No more than the actual reasonable cost for providing electronic records

R.I.G.L. § 38-2-4

Fitzgerald v. East Providence Police Dept., PR 14-12;

Fitzgerald v. Warwick Police Dept., PR 14-13;

Duxbury v. Town of Coventry, PR 13-16

“the costs of redaction should be borne by the requesting party because it is part of the process of retrieving and producing the requested document”

DARE v. Gannon, 819 A.2d 651, 661 (R.I. 2003)

Public Body May Seek Pre-Payment

“production of records shall not be deemed untimely if the public body is awaiting receipt of payment for costs properly charged under § 38-2-4”

R.I.G.L. § 38-2-7

Cost and Delivery Procedures

At the option of the person requesting the records, the public body shall provide copies * * * electronically, by facsimile, or by mail * * * unless complying * * * would be unduly burdensome due to the volume of records requested or the costs incurred.

R.I.G.L. § 38-2-3(k)

Fitzgerald v. East Providence Police Dept., PR 14-12

“Any person or entity requesting copies of public records may elect to obtain them in any and all media in which the public agency is capable of providing them”

R.I.G.L. § 38-2-3(g)

Cost and Delivery Procedures

- Persons requesting delivery responsible for any actual cost of delivery.

R.I.G.L. § 38-2-3(k)

- May assess charge for retrieving records from storage where public body is assessed retrieval fee.

R.I.G.L. § 38-2-4(a)

Training

Chief Administrative Officers of all public bodies must certify by January 1st of each year that all employees who have authority to grant/deny access to records have received training.

R.I.G.L § 38-2-3.16

Remedies

\$2,000 for a willful and knowing violation

\$1,000 for a reckless violation

Injunctive Relief

Attorney Fees

*International Assoc. of Fire Fighters v. Nasonville Fire
Dept./District, PR 14-24B*

Department of Attorney General

Peter F. Kilmartin, Attorney General



Open Meetings Act

Purpose

“It is essential...that public business be performed in an open and public manner and that citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of Public Policy.”

R.I.G.L. § 42-46-1

1. Does OMA apply?

2. Rolling quorum

3. Notice

Three Threshold Elements that Trigger OMA

- A “quorum” of a “public body” has a “meeting”
- If one (or more) element is missing, the OMA does not apply

What is a Public Body?

“department, agency, commission, committee, board, council, bureau, or authority or any subdivision thereof of state or municipal government”

R.I.G.L. § 42-46-2(c)

Pontarelli v. RI Council on Elem. & Second Ed., No. 2015-332-Appeal;

Costa v. RI Statewide Indepen. Living Council, OM 16-13;

In Re: Statewide Independent Council, ADV OM 16-02

What is a Quorum?

“unless otherwise defined ...
a simple majority of the
membership”

R.I.G.L. § 42-46-2(d)

Mathews v. Newport City Council, OM 16-04;

Grieb v. Aquidneck Island Planning Comm, OM 16-06;

Cushman v. Warwick City Council, OM 16-10

What is a Meeting?

“The convening of a public body to discuss and/or act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power”

R.I.G.L. § 42-46-2(a)

In Re: Coventry School Committee, ADV OM 16-01

“List serves” (email distribution lists through which subscribers receive information on a particular topic) do not violate the OMA

Common Cause v. 195 Redevelopment Dist. Comm., OM 14-21

“Rolling” or “Walking” Quorum

A series of meetings each less than a “quorum,” but that collectively represent a “quorum”

Mudge v. North Kingstown School Comm., OM 13-11;
Vadenais v. North Smithfield Town Council, OM 13-34

Electronic Communication

Discussions of a public body
via electronic communication
is permitted **only** to schedule
a meeting.

R.I.G.L. § 42-46-5(b)(1)

Warfel v. New Shoreham Shellfish Comm., OM 13-05

Members must be present to participate in meeting except:

- on active duty
 - has a **disability** and cannot otherwise participate
- Subject to Governor's Commission on Disabilities

R.I.G.L. § 42-46-5(b)(2),(3) & (4)

Convening Into Closed Session

- “Open Call”
 - Majority vote in open session
 - State in open session and in minutes subsection of § 42-46-5
 - State in open session and in minutes a statement of the business to be discussed
 - Not discuss any other matter

R.I.G.L. § 42-46-4(a)

Graziano v. R.I. Lottery Comm., OM 99-06;

Anderson v. Little Compton School Coomittee, OM 16-12

Executive Session

- Every meeting of all public bodies shall be open to the public unless closed pursuant to §§ 42-46-4 and 42-46-5.

R.I.G.L. § 42-46-3

- Ten (10) purposes for which meeting may be closed.

R.I.G.L. § 42-46-5(a)(1)-(10)

R.I.G.L. § 42-46-5(a)(1)

- **Discussions** of job performance, character, or physical or mental health of affected person or persons
 - advanced written notice that discussion may take place in open session
 - state in open call and open minutes that notice provided

Nova v. The Compass School, OM 16-07;
Anderson v. Little Compton School Committee, OM 16-12

R.I.G.L. § 42-46-5(a)(2)

Sessions or work sessions
pertaining to collective
bargaining or litigation

Comley v. Little Compton School Committ., OM 16-05

R.I.G.L. § 42-46-5(a)(4)

Investigative proceedings
regarding allegations of
civil or criminal
misconduct

R.I.G.L. § 42-46-5(a)(4)

R.I.G.L. § 42-46-5(a)(8)

School Committee sessions to conduct student disciplinary hearings or to review other matters relating to the privacy of students or their records, provided that:

- Advanced written notice that discussion may take place in open session
- State in open call and open minutes that notice provided

Votes

Executive session votes must be disclosed upon reconvening into open session except if disclosure would jeopardize a strategy, negotiation, or investigation.

Marcello v. Scituate Town Council, OM 16-01

Votes

Within two (2) weeks of any vote a record listing how each member voted on each issue must be made available at the office of the public body.

Carney v. Charlestown Town Council, OM 13-19

Pierson v. Coventry School Committee, OM 14-18

Notice

Two Types of Notice

- Annual Notice: at the beginning of each calendar year
- Supplemental Notice: a minimum of 48 hours before every meeting

Hevey v. Coventry Town Council, OM 13-15;

Common Cause v. I-195 Redevelop Dist Comm., OM 13-27

Posting Requirements

- Principal office of public body
- One other prominent location within the governmental unit
- Secretary of State (electronic)

R.I.G.L. § 42-46-6(c);

Stewart et al. v. West Greenwich Town Council, OM 11-13

Notice Requirements

Annual

- Dates, times and location of regularly scheduled meetings
- Available to public upon request & posted on SOS website

Supplemental

- Date, time and location of all meetings
- Date posted
- Statement specifying business to be discussed

Tanner v. Town of East Greenwich,
880 A.2d 784 (R.I. 2005)

“intended to establish a flexible standard aimed at providing fair notice to the public under the circumstances”

Anolik v. Zoning Bd. of Review of the
City of Newport,
64 A.3d 1171 (R.I. 2013)

“IV. Communications

Request for extension from
Turner Scott received 11/30/08
Re: Petition of Congregation
Jeshuat Israel.”

**Pontarelli v. RI Council on Elementary &
Secondary Education,**
(issued December 21, 2016)

**“Approval of RIDE’s Executive
Pay Plan – Enclosure 7B”**

- Numerous pay plans approved
- Enclosure not attached

Improper Agenda Items

- Old Business/New Business
- Treasurer's Report
- Police Chief's Report
- Any other matter brought before the Board

Executive Session Notice

- If publicly known, provide detailed statement – If not publicly known, may use more general language.
- “Anticipated Litigation”

Graziano v. R.I. Lott’y Comm., OM 99-06

Executive Session Notice

- Public body is required to individually label each item it intends to discuss in executive session.
- Identify the number of items to be discussed.
- No boiler plate language.

Proper Executive Session Notice

1. R.I.G.L. § 42-46-5(a)(1)
(Town Manager performance review)
2. R.I.G.L. § 42-46-5(a)(2)
(Police Union Negotiation concerning)
3. R.I.G.L. § 42-46-5(a)(1),(2)
(Personnel Matter)
4. R.I.G.L. § 42-46-5(a)(2)
(potential litigation – land dispute)

Amending Agenda (Not School Committee)

- By majority vote
- Informational purposes only and may not be voted on except:
 1. Emergency
 2. Refer matter to another committee/person

R.I.G.L. § 42-46-6(b)

Taylor v. Providence Housing Authority, OM 12-33;
Gilkenson v. Cranston City Council, OM 13-16

Amending Agenda

School Committee

1. Posted within 48 hours of meeting at:
 - a. The 2 public locations
 - b. Secretary of State
 - c. Posted on School District's website
2. *Amended items unexpected and could not have been added for newspaper publication*
3. *State for record and minutes why agenda items could not have been added in newspaper and need to be addressed at this meeting*

Amending Agenda

School Committee (*Cont.*)

4. Process available to provide timely notice to:
 - a. Any person who has requested
 - b. Reasonable steps taken to make public aware
5. Original notice indicate that changes will be:
 - a. Posted on website
 - b. Posted in 2 locations
 - c. Filed with Secretary of State

R.I.G.L. § 42-46-6(e)

AUDIO/VIDEOTAPING

- Subject to “reasonable restrictions” a public body must allow taping:
 - preserve orderly conduct of meeting
 - safeguard public facility against damage caused by recording equipment

Sheldon v. Warwick Min. Hous. Review Brd., OM 14-14;
Belcher v. Mansi, 569 F.Supp. 379 (D.R.I. 1983)

Minutes

“ALL PUBLIC BODIES SHALL KEEP WRITTEN MINUTES OF ALL THEIR MEETINGS”

Includes: both open and closed/executive sessions

R.I.G.L. § 42-46-7(a)

Minutes

- the date, time, and place of the meeting
- the members who are absent/present
- a record by individual member of any vote(s) taken
- any other relevant information that a member of the public body requests

Nova v. The Compass School, OM 16-07;
Tanguay v. City of Warwick, OM 16-11

DISCLOSURE OF UNOFFICIAL **MINUTES**

- (All*): “unofficial minutes shall be available, to the public at the office of the public body, within thirty-five (35) days of the meeting or at the next regularly scheduled meeting, whichever is earlier[.]” R.I. Gen. Laws § 42-46-7(b)(1).

DISCLOSURE OF UNOFFICIAL MINUTES

—Exceptions: Sealed executive session
minutes

Extend the time period for
filing minutes and publicly
state the reason

DISCLOSURE OF UNOFFICIAL MINUTES

- (Fire Companies): “within twenty-one (21) days of the meeting, but not later than seven (7) days prior to the next regularly scheduled meeting, whichever is earlier, on the secretary of state’s website.” R.I. Gen. Laws § 42-46-7(b)(2).
 - No extension
 - Post to Secretary of State website

Block v. Ashway Fire District, OM 15-15

DISCLOSURE OF **OFFICIAL/APPROVED MINUTES**

Public bodies within the executive branch of state government, all state public and quasi-public boards, agencies, and corporations, and all fire companies

DISCLOSURE OF OFFICIAL/APPROVED **MINUTES**

“shall file a copy of the minutes of all open meetings with the secretary of state * * * within thirty-five (35) days of the meeting[.]” R.I. Gen. Laws § 42-46-7(d).

Exception: Public bodies whose responsibilities are solely advisory in nature

— No extension

DISCLOSURE OF EXECUTIVE **SESSION MINUTES**

- (All): “available at the next regularly scheduled meeting unless the majority of the body votes to keep the minutes closed pursuant to §§ 42-46-4 and 42-46-5.” R.I. Gen. Laws § 42-46-7(c).
 - No extension

Public Comment (Not School Committee)

Public body may respond to
comments initiated by a
member of the public during a
properly noticed open forum

R.I.G.L. § 42-46-6(d)

Public Comment School Committee

Pursuant to a request:

1. Submitted in writing
2. By a member of the public
3. During the public comment session
4. Informational purposes only

R.I.G.L. § 42-46-6(b)

Nothing requires any public body to hold an open forum session, to entertain or respond to any topic nor does it prohibit any public body from limiting comment on any topic

R.I.G.L. § 42-46-6(d)

Remedies

- File an action with the Superior Court
- File a complaint with the Department of Attorney General

R.I.G.L. § 42-46-8

Penalties

- Injunctive relief and declare actions null and void
- Civil fine up to \$5,000 for a willful and knowing violation
- Attorney fees and costs

R.I.G.L. § 42-46-8(d)

Department of Attorney General

Peter F. Kilmartin, Attorney General

